

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK CARBONARO, claiming as child of MICHAEL CARBONARO and
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 02-397; Submitted on the Record;
Issued October 7, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly computed appellant's survivor's benefits under 5 U.S.C. § 8133(a)(2).

On July 22, 1982 the employee died due, in part, to employment-related asbestosis.¹ All of the claim forms completed by the employee listed only his wife, Grace Carbonaro, as a dependent. On August 12, 1982 the employee's widow filed a claim for survivor's benefits, on which she listed as her dependents, two living sons and one deceased son. However, the widow did not list the birth dates of her sons or otherwise submit any information regarding them. On a separate claim form received by the Office on September 8, 1982, the widow listed only her adult son Frank Carbonaro, as her dependent, indicated that his birth date was May 9, 1937 and listed his home address as different from hers. As the widow did not submit Frank Carbonaro's birth certificate or any explanation as to why she believed he was entitled survivor's benefits and as no mention was made of Frank Carbonaro during the frequent correspondence between the Office and the widow's attorneys, the Office assumed that the listing of Frank Carbonaro as a dependent child was in error. Therefore, on January 26, 1984, the Office determined that, effective July 23, 1982, the employee's widow was entitled to death benefits at the rate 50 percent of the employee's monthly pay, the rate granted to widows without dependent children pursuant to 5 U.S.C. § 8133.

On May 18, 1984 appellant telephoned the Office and inquired as to the status of his claim for survivor's benefits. He informed the Office that he was disabled and had been incapable of self-support since prior to age 18. By return telephone call on May 21, 1984 and by letter dated June 5, 1984, appellant was informed of the evidence necessary to establish his claim for survivor's benefits. By decision dated June 28, 1984, the Office denied appellant's claim for survivor's benefits on the grounds that he did not submit any evidence to establish that he had

¹ On October 8, 1975, the Office accepted that appellant, a pipe fitter, developed asbestosis as a result of his federal employment.

been disabled since prior to age 18, a necessary prerequisite to eligibility for receiving benefits under the Federal Employees' Compensation Act as an adult dependent.

Subsequent to the Office's decision, appellant submitted the necessary evidence in support of his disability, including a favorable determination by the Social Security Administration, and further submitted documents establishing that effective February 26, 2001, he had been appointed Executor of the widow's estate.

By letter dated October 3, 2001, the Office awarded appellant survivor's benefits at the rate of 40 percent of the employee's monthly pay or \$1,263.69, from April 13, 1999 forward, the period following the widow's death. The Office informed appellant that he was also entitled to receive, for the period July 23, 1982 to April 12, 1999, the 10 percent difference between what the widow received after the employee's death and what she would have received had appellant been listed as a dependent and that it was currently calculating that exact amount.²

The Board finds that the Office properly determined that appellant was entitled to compensation at the rate of 40 percent of the employee's monthly pay, for the period April 13, 1999 forward and was further entitled to receive, as Executor of the widow's estate, the additional 10 percent of the employee's monthly pay for the period July 23, 1982 to April 12, 1999, to which the widow, with one dependent child, would have been entitled.

The Act³ provides that if an employee's death results from an injury sustained in the performance of duty, the United States will pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule: (1) to the widow or widower, if there is no child, 50 percent; (2) to the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child, not to exceed 75 percent;⁴ (3) to the children, if there is no widow or widower, 40 percent for 1 child and 15 percent for each additional child, not to exceed a total of 75 percent.⁵

On appeal appellant asserts that as a widow with a dependent child, the widow was entitled to an additional 15 percent, not 10 percent. The Board notes that while appellant is correct that a widow is entitled to 15 percent of the employee's monthly pay for each dependent child, pursuant to section 8133(a)(2) of the Act, the widow's personal entitlement in that

² The Board notes that by letter dated January 23, 2002, the Office granted appellant, as Executor of the widow's estate, the additional 10 percent of the employee's monthly pay for the period July 23, 1982 to April 12, 1999, to which the widow, with one dependent child, would have been entitled. However, as appellant filed his appeal on November 7, 2001, the Board had no jurisdiction to review the January 23, 2002 decision. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Algimantas Bumelis*, 48 ECAB 679 (1997).

³ 5 U.S.C. §§ 8101-8193.

⁴ See also section 10.410 of the implementing federal regulations, 20 C.F.R. § 10.410, which provides: "(b) If there is a child entitled to compensation, the compensation for the surviving spouse equals 45 percent of the employee's pay, plus 15 percent for each child, but the total percentage may not exceed 75 percent."

⁵ 5 U.S.C. § 8133(a). *Naomi G. Gallagher*, 41 ECAB 969 (1990); *Wanda Avant (James A. Avant)*, 40 ECAB 1155 (1989).

situation is decreased to 45 percent. Therefore, under the Act, a widow with 1 dependent child is entitled to a total of 60 percent of the employee's monthly pay, 45 for widow's benefits, plus 15 percent for the dependent child. In the instant case, the widow received benefits at the rate of a widow with no dependents, in the amount of 50 percent of the employee's monthly pay. Once the Office determined that she had a dependent, it was established that the Office had underpaid the widow by 10 percent of the employee's monthly pay for the period between the employee's death on July 22, 1982 and her own death on April 12, 1999. Therefore, the Office properly determined that appellant, as the surviving dependent child, is entitled to receive benefits at the rate of 40 percent of the employee's death for the period April 13, 1999 to the present and is further entitled to receive, as Executor of the widow's estate, the additional 10 percent the widow was entitled to, as a widow with 1 dependent child, for the period July 23, 1982 to April 12, 1999.

The decision of the Office of Workers' Compensation Programs dated October 3, 2001 is affirmed.

Dated, Washington, DC
October 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member